FILED BY CLERK
JAN 19 2012
COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA, Respondent, v. NELSON HOWARD BASS, Petitioner.	2 CA-CR 2011-0261-PR DEPARTMENT B MEMORANDUM DECISION Not for Publication Rule 111, Rules of the Supreme Court

PETITION FOR REVIEW FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause Nos. CR20070265 and CR20092787001

Honorable Richard D. Nichols, Judge

REVIEW GRANTED; RELIEF DENIED

Robert J. Hirsh, Pima County Public Defender
By Rebecca A. McLean
Tucson
Attorneys for Petitioner

K E L L Y, Judge.

¶1 Nelson Bass petitions this court for review of the trial court's summary denial of his of-right petitions for post-conviction relief brought pursuant to Rule 32, Ariz. R. Crim. P. We will not disturb that ruling unless the court clearly has abused its discretion. *State v. Swoopes*, 216 Ariz. 390, ¶ 4, 166 P.3d 945, 948 (App. 2007).

¶2 After a settlement conference, Bass pled guilty in CR20070265 to manufacturing methamphetamine and in CR20092787 to possession of methamphetamine for sale. At sentencing, both of Bass's attorneys argued that he should receive the presumptive prison term, and the trial court imposed concurrent, presumptive, ten-year prison terms on each count. Bass then filed notices and identical petitions for post-conviction relief in both cause numbers. He asserted he had been "convinced" to take the plea during the settlement conference by his attorneys' purported willingness to seek a mitigated sentence based on Bass's apparently terminal medical condition, and the settlement judge's opinion such a sentence might be imposed. He contended his attorneys' "agreeing to argue for a mitigated sentence and then failing to do so" constituted ineffective assistance of counsel and requested an evidentiary hearing on the issue and "thereafter a resentencing, at which counsel argue in accordance with their promises" to seek a mitigated sentence.

¶3 The trial court summarily denied relief.[1] It determined the transcript of the settlement conference did not support Bass's contention that his attorneys had agreed to

[1]Bass asserted in his reply to the state's response to his petition for post-conviction relief that the trial court had considered incorrect information at sentencing—specifically the number of Bass's prior convictions. The court summarily rejected this claim, and

seek mitigated prison terms and found that both counsel had made reasoned tactical decisions to request the presumptive term because the court was unlikely to impose a mitigated term based on "the numerous offenses with which [Bass] was originally charged, his criminal history, and the seriousness of the offenses to which he ultimately pled." The court additionally found Bass had failed to demonstrate resulting prejudice. The court noted that, had Bass gone to trial, he faced a possible thirty-seven-year prison term and, at sentencing, the court "was faced with significant criminal history, and two counts involving the manufacture and distribution of significant amounts of methamphetamine" and that in light of those factors a presumptive term was warranted despite the evidence of Bass's medical condition.

¶4 On review, Bass reasserts the same argument, contending he was "misled into accepting the plea based on his attorneys' representations" that they would seek a mitigated sentence and by the settlement judge's belief a mitigated term was reasonable. Thus, he reasons, he presented a colorable claim that his attorneys had provided ineffective assistance at sentencing and he is entitled to an evidentiary hearing. "To state a colorable claim of ineffective assistance of counsel, a defendant must show both that counsel's performance fell below objectively reasonable standards and that this deficiency prejudiced the defendant." *State v. Bennett*, 213 Ariz. 562, ¶ 21, 146 P.3d 63, 68 (2006); *see also State v. Runningeagle*, 176 Ariz. 59, 63, 859 P.2d 169, 173 (1993)

Bass does not raise this argument on review. *See* Ariz. R. Crim. P. 32.9(c)(1) (petition for review shall contain "the reasons why the petition should be granted").

("[A] defendant is entitled to an evidentiary hearing only when he presents a colorable claim—one that, if the allegations are true, might have changed the outcome.").

¶5 We agree with the trial court that nothing in the settlement conference transcript suggests that either of Bass's attorneys agreed to seek mitigated prison terms, or even that either attorney believed mitigated terms were likely to be imposed under the circumstances, despite the settlement judge's opinion that they might. Indeed, counsel in CR20070265 opined that seeking a mitigated term would be "overreaching." Moreover, Bass stated at his change-of-plea hearing that he had been promised nothing outside the plea agreement "to induce [him] to plead guilty." The court was entitled to rely on that statement. Thus, to the extent Bass's claim rests on an assertion that his attorneys failed to do something they had promised to do, it is not colorable.

¶6 Additionally, Bass does not address the trial court's determination that his attorneys' decision to request a presumptive sentence in light of Bass's criminal history and the circumstances of his case did not fall below prevailing professional standards. Tactical decisions, if they have a reasoned basis, will not support a claim of ineffective assistance of counsel. *See State v. Gerlaugh*, 144 Ariz. 449, 455, 698 P.2d 694, 700 (1985). We presume "that counsel's conduct falls within the wide range of reasonable professional assistance" that "'might be considered sound trial strategy.'" *Strickland v. Washington*, 466 U.S 668, 689 (1984), *quoting Michel v. Louisiana*, 350 U.S. 91, 101 (1955). Bass cites no authority, and we find none, suggesting that in order to be constitutionally effective an attorney must request a mitigated prison term when that attorney reasonably believes the sentencing court will not impose one.

¶7 Moreover, insofar as Bass asserts he was induced to enter the pleas by his belief that his attorneys would seek mitigated prison terms, that claim also does not warrant relief. *Cf. State v. Pac*, 165 Ariz. 294, 295-96, 798 P.2d 1303, 1304-05 (1990) (plea involuntary if defendant lacks information central to decision to enter plea). The only relief requested by Bass was that he be resentenced and his attorneys be required to request a mitigated term. But, even assuming Bass was induced to enter the pleas, he cites no authority suggesting that is the appropriate remedy. Nor do we find that such relief would be sensible because it would, in effect, require counsel to argue a position they had determined to be futile. Instead, if Bass was induced to enter the pleas by the mistaken belief that his attorneys would seek a mitigated sentence, his pleas arguably would have been involuntary. *See* Ariz. R. Crim. P. 17.1(b) (guilty plea must be "voluntarily and intelligently made"); *cf. State v. Chavez*, 130 Ariz. 438, 439, 636 P.2d 1220, 1221 (1981) (plea may be withdrawn when "parties to a plea bargain were mistaken as to the existence of a material factor which caused them to enter the agreement"). The relief available to Bass in that circumstance would be to withdraw his guilty pleas—relief he does not request. *See Chavez*, 130 Ariz. at 439, 636 P.2d at 1221; *see also* Ariz. R. Crim. P. 17.5 (court may permit defendant to withdraw from plea "to correct a manifest injustice").

¶8 Last, we agree with the trial court that Bass has not demonstrated a reasonable likelihood that he would have received lesser sentences had his attorneys requested them. *See Runningeagle*, 176 Ariz. at 63, 859 P.2d at 173. He identifies no mitigating evidence his attorneys failed to present, and the court noted in its ruling

denying Bass's petition for post-conviction relief that it had considered the mitigating evidence presented, including his medical condition, before imposing presumptive prison terms. *Cf.* A.R.S. § 13-701(E) (court required to consider mitigating factors); *State v. Cazares*, 205 Ariz. 425, ¶ 7, 72 P.3d 355, 357 (App. 2003) ("[W]e presume the [trial] court considered any evidence relevant to sentencing that was before it.").

¶9 For the reasons stated, although we grant review, we deny relief.

/s/ Virginia C. Kelly
VIRGINIA C. KELLY, Judge

CONCURRING:

/s/ Garye L. Vásquez
GARYE L. VÁSQUEZ, Presiding Judge

/s/ Philip G. Espinosa
PHILIP G. ESPINOSA, Judge